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5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

7 TOP NOTCH SOLUTIONS, INC. and  
8 ROBERT RASHIDI,

9 Plaintiffs,

10 v.

11 CROUSE AND ASSOCIATES INSURANCE  
12 BROKERS, INC., MCGRIFF, SEIBELS &  
WILLIAMS, INC., and LAW OFFICES OF  
PUCIN & FREIDLAND, P.C.,

13 Defendants.

CASE NO. C17-0827-JLR-MAT

ORDER RE: DEFENDANTS'  
MOTIONS FOR SANCTIONS

14  
15 INTRODUCTION

16 Defendants Crouse and Associates Insurance Brokers, Inc. (Crouse) and McGriff, Seibels  
17 & Williams, Inc. (MSW) filed motions for sanctions against plaintiffs Top Notch Solutions, Inc.  
18 and Robert Rashidi. (Dkts. 165 & 168.) Plaintiffs object to the requested sanctions. (Dkts. 180  
19 & 181.) The Court, having considered the motions, responses, and the remainder of the record,  
20 finds defendants entitled to sanctions as set forth below.

21 BACKGROUND

22 Plaintiffs initiated this matter in April 2017. (*See* Dkt. 1-1.) The Court set a June 4, 2018  
23 deadline for the completion of discovery (Dkt. 39), later extended to January 7, 2019 (Dkt. 77). In

1 early October 2018, the parties stipulated to a temporary stay in the proceedings and continuance  
2 of the trial and other dates to accommodate medical treatment and surgery for plaintiffs' counsel,  
3 Jan Brucker. (Dkts. 100 & 101.)

4 In a joint status report requested by the Court, plaintiffs committed to producing all  
5 outstanding written discovery by November 20, 2018 and proposed a deadline of April 1, 2019 for  
6 completion of discovery. (Dkt. 106 at 2.) In December 2018, defendants MSW and Crouse filed  
7 motions to compel responses to discovery requests propounded in May and June 2018 respectively.  
8 (Dkts. 112 & 121.) Crouse noted the absence of any responses in the three months prior to  
9 counsel's surgery or as of the agreed November 2018 due date, belated and incomplete responses  
10 to interrogatories received more than two months after counsel's surgery, and a failure to produce  
11 documents. (Dkts. 112 & 124.) MSW noted deficient responses to requests for production,  
12 including a failure to identify which documents in bulk productions were responsive to specific  
13 requests. (Dkt. 121.) Counsel for plaintiffs denied any need for Crouse's motion to compel given  
14 discovery responses submitted after her surgery (Dkts. 119 & 120), but did not respond to MSW's  
15 motion.

16 By Order dated January 17, 2019, the Court took note of a report from MSW that plaintiffs'  
17 counsel may have experienced a family medical issue and directed the parties to submit an updated  
18 status report. (Dkt. 127; *see also* Dkt. 126.) In early February 2019, counsel for plaintiffs partially  
19 responded to the motions to compel, describing her ongoing personal and family issues and  
20 continuing production of documents. (Dkts. 128 & 129.) She requested an extension of time to  
21 complete responses to the motions, summarize document production, and continue to supplement  
22 discovery responses, and objected to duplicative and redundant requests. In a joint status report  
23 submitted shortly thereafter, defendants noted plaintiffs had recently produced questionably

1 relevant documents and described ongoing issues with the absence and/or sufficiency of responses  
2 to outstanding requests. (Dkt. 131.) The Court subsequently reset deadlines, including a discovery  
3 completion date of May 15, 2019, and referred all non-dispositive motions in this matter to the  
4 undersigned. (Dkt. 133.)

5 At a hearing on March 11, 2019, the undersigned heard argument on defendants' motions  
6 to compel. (Dkt. 137.) Counsel for plaintiffs conceded the failure to fully comply with requests  
7 for discovery, pointing to her health and other issues. The Court granted Crouse's motion in part,  
8 finding plaintiffs had waived any objections to responding to all interrogatories by failing to timely  
9 respond or submit a request for relief, but otherwise deferred a ruling. (*Id.*) The Court ordered  
10 counsel for plaintiffs to associate additional counsel to assist with the litigation and to submit a  
11 plan for completing discovery within thirty days of the plan submitted, and required that counsel  
12 identify with specificity the documents responsive to individual discovery requests.

13 Plaintiffs associated additional counsel and submitted a discovery plan. The plan set dates  
14 for satisfying various document requests and indicated plaintiffs would produce any additional  
15 documents to pre-existing and then pending discovery requests by May 10, 2019, and supplement  
16 with any additional documents found. (Dkt. 141.) On May 16, 2019, the day after the discovery  
17 deadline, plaintiffs' counsel notified counsel for defendants of additional documents to be  
18 produced (*see* Dkt. 152 at 3) and counsel for defendants requested a ruling on their motions to  
19 compel. Plaintiffs' counsel requested additional time to complete responses to outstanding  
20 discovery requests. (Dkt. 152.)

21 At a second hearing on June 5, 2019, counsel for plaintiffs indicated they were continuing  
22 to produce documents and, with the exception of some banking records, expected completion of  
23 discovery by June 10, 2019. Counsel for defendants argued prejudice from the late and still

1 ongoing production, pointing to the need to update expert reports, the June 20, 2019 dispositive  
2 motion deadline, and expenses associated with the delays. Counsel for plaintiffs reiterated prior  
3 explanations for the delays. The Court found ample evidence plaintiffs had not complied with  
4 their discovery obligations and sanctions appropriate. The Court granted the motions to compel,  
5 but deferred a ruling on specific sanctions pending further briefing. (Dkt. 158.) The Court now  
6 considers herein MSW's Petition for Attorney's Fees and Discovery Sanctions (Dkt. 165) and  
7 Crouse's Motion for Sanctions (Dkt. 168).

#### 8 DISCUSSION

9 MSW seeks an award of attorney's fees related to its motion to compel and the failure to  
10 comply with discovery, and an order excluding as inadmissible any documents produced after the  
11 close of discovery on May 15, 2019. (Dkt. 165.) MSW argues its request for \$17,356.50 in fees  
12 is commensurate with discovery abuses dating back more than a year from present. In support of  
13 an order of inadmissibility, MSW notes plaintiffs continued to produce over 1,880 documents after  
14 the close of discovery and have neither indicated their discovery production is complete, nor  
15 updated the discovery index.

16 Crouse seeks dismissal of plaintiffs' claims and monetary sanctions, including \$10,325.50  
17 in attorney's fees associated with its motion to compel and an additional \$20,000.00. (Dkt. 168.)  
18 Crouse notes the discovery plan submitted by plaintiffs did not contemplate responses to  
19 unanswered interrogatories, despite the Court-ordered waiver of plaintiffs' objections. Crouse  
20 states that, while plaintiffs supplemented their responses, they have not withdrawn their objections  
21 and it remains unclear whether they continue to withhold information. Plaintiffs continued to  
22 produce over 4,000 documents after the May 15, 2019 deadline, without specificity as to  
23 responsiveness, produced some of those documents days after the date they had proposed for

1 discovery completion, and indicated additional transmissions of documents may be expected. (*See*  
2 Dkt. 169, ¶9 and Ex. 3.)

3 Plaintiffs respond that they provided significant information and documents even before  
4 the filing of the motions to compel and that, while they did require additional time to respond,  
5 defendants' discovery requests have been extremely broad and unduly burdensome. (Dkts. 180 &  
6 181.) They deny any impediment to defendants' preparation of defenses or dispositive motions,  
7 stating the documents and information relied upon in pending motions for summary judgment were  
8 produced well before the discovery deadline or obtained from the deposition of plaintiff Robert  
9 Rashidi. In relation to Crouse's interrogatories, plaintiffs maintain the Court-ordered waiver of  
10 objections necessitated responses to more discovery requests than permitted under the rules and  
11 the production of documents with little to no relevance to this case. Plaintiffs' counsel notes the  
12 engagement of six additional individuals to assist in ongoing document review and redaction.

13 Plaintiffs reject the propriety of the sanctions requested. They assert defendants improperly  
14 seek compensation for time expended to review responsive discovery and ask that the Court defer  
15 a ruling on sanctions. They assert the proper remedy, if any, "is to now equalize the equation" by  
16 extending time and adjusting case event dates, up to and including the trial date. (Dkt. 180 at 3.)<sup>1</sup>

17 A. Reasonable Attorney's Fees

18 Under Federal Rule of Civil Procedure 37(a), the Court "must" award reasonable expenses  
19 associated with a motion to compel discovery, including attorney's fees, if the moving party

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20 <sup>1</sup> Plaintiffs also, citing to Federal Rule of Civil Procedure 56(d), request extension of the trial and  
21 other dates in the case schedule, including time for responding to pending motions for summary judgment.  
22 Fed. R. Civ. P. 56(d) ("If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot  
23 present facts essential to justify its opposition [to summary judgment], the court may: (1) defer considering  
the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue  
any other appropriate order.") Because it is unrelated to and not properly entertained in relation to the  
motions for sanctions, the Court declines to address this request.

1 prevails on the motion. Fed. R. Civ. P. 37(a)(5)(A). Exceptions to this rule apply if: (i) the movant  
2 filed the motion before attempting in good faith to obtain the discovery without court action; (ii)  
3 the opposing party's failure to comply was substantially justified; or (iii) other circumstances make  
4 an award of expenses unjust. *Id.*

5 As reflected in both the motions to compel and the motions for sanctions, and as discussed  
6 in two hearings, plaintiffs repeatedly and over a lengthy period of time failed to comply with  
7 discovery deadlines. These failures followed multiple attempts to obtain discovery without court  
8 action and necessitated the filing of motions to compel, the involvement of the Court, and the  
9 association of additional counsel. While plaintiffs' counsel offered explanations, they do not fully  
10 account for the delays and omissions in responding to defendants' requests for discovery.  
11 Moreover, despite the fact the deadlines for completion of discovery and for filing dispositive  
12 motions have passed (*see* Dkt. 133), and despite the association of additional counsel, plaintiffs  
13 have yet to complete their production of documents or responses to interrogatories. The arguments  
14 in opposition to the request for attorney's fees are not persuasive. It cannot be reasonably said  
15 either that the failure to comply with discovery was substantially justified or that other  
16 circumstances make an award of expenses unjust. Defendants MSW and Crouse are therefore  
17 entitled to reasonable attorney's fees under Rule 37(a)(5)(A).

18 In calculating the reasonableness of attorney's fees, the Court employs the "lodestar"  
19 method, calculating "the number of hours reasonably expended on the litigation multiplied by a  
20 reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *Camacho v. Bridgeport*  
21 *Fin., Inc.*, 523 F.3d 973, 978 (9th Cir. 2008). The Court looks to hourly rates "'prevailing in the  
22 community for similar work performed by attorneys of comparable skill, experience, and  
23 reputation.'" *Ingram*, 647 F.3d at 928 (quoted case omitted). The "relevant legal community" is

generally the forum in which the district court sits. *Gates v. Deukmejian*, 987 F.2d 1392, 1405 (9th Cir. 1993). When determining the reasonableness of the hours expended, a court should not consider hours that are “excessive, redundant, or otherwise unnecessary[.]” *Hensley*, 461 U.S. at 434.

“Although in most cases, the lodestar figure is presumptively a reasonable fee award, the district court may, if circumstances warrant, adjust the lodestar to account for other factors which are not subsumed within it.” *Camacho*, 523 F.3d at 978 (quoted source omitted). In *Kerr v. Screen Guild Extras, Inc.*, the Ninth Circuit adopted the consideration of twelve factors bearing on reasonableness:

(1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the “undesirability” of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.

*Kerr*, 526 F.2d 67, 70 (9th Cir. 1975). Although several *Kerr* factors may be relevant to determine whether to adjust a fee award after the initial lodestar calculation, “[t]he Supreme Court has noted . . . that the *Kerr* factors are largely subsumed within the initial calculation of reasonable hours expended at a reasonable hourly rate, rather than the subsequent determination of whether to adjust the fee upward or downward.” *Chalmers v. Los Angeles*, 796 F.2d 1205, 1212 (9th Cir. 1985) (citing *Hensley*, 461 U.S. at 434 n. 9). See also *Jordan v. Multnomah Cnty.*, 815 F.2d 1258, 1264 n.11 (9th Cir. 1987) (district court need not address every *Kerr* factor). The “most critical” factor in determining the reasonableness of a fee award “is the degree of success obtained.” *Hensley*, 461 U.S. at 436.

1           1.       MSW's fee request:

2           MSW's request for \$17,356.50 in attorney's fees accounts for fees incurred by an associate  
3 attorney, omits fees incurred by two partners and a paralegal, and discounts the associate's \$350.00  
4 standard rate by ten percent, to \$315.00 per hour. (Dkts. 166 & 167.) MSW asserts the complexity  
5 of this matter, the reasonableness of the billing rate as comparable to prevailing market rates, and  
6 the nature and extent of discovery abuses giving rise to the filing of its motion to compel. MSW  
7 submits invoices showing fees incurred and an affidavit analyzing the categories of billed time,  
8 amounting to a total of 55.1 hours of attorney time. (Dkt. 167.)

9           The Court finds both the total number of hours expended and the hourly rate reasonable,  
10 particularly with consideration of adjustments made to omit some fees and to discount a standard  
11 rate. Although the Court has considered the *Kerr* factors, the parties do not argue for or against  
12 any adjustment based upon them, and the Court's independent review does not support any  
13 adjustment. Nor is a lengthy discussion of the *Kerr* factors warranted in view of the reasonableness  
14 of the attorney's fees requested. The Court accordingly finds MSW entitled to the \$17,356.50 in  
15 attorney's fees requested.

16           2.       Crouse's fee request:

17           Crouse attests to incurring approximately \$10,325.50 in attorney's fees, an amount  
18 accounting for 56.3 hours of work by two attorneys, who initially billed at rates of \$175.00 and  
19 \$200.00 per hour, with rates increased to \$180.00 and \$205.00 per hour in early 2019. (Dkt. 169,  
20 ¶¶11-13.) Counsel for Crouse attests these rates are competitive and likely lower than rates of  
21 other regional law firms. (*Id.*, ¶13.) Counsel provides a bill of costs outlining tasks performed for  
22 the fees sought and invoices itemizing fees for services billed. (*Id.*, ¶¶ 14-15 and Ex. 4.)

23           Crouse argues the amount of fees incurred is not necessarily commensurate with the time



1 expended and prejudice resulting from the one-year delay in responses, the failure to comply with  
2 discovery-related orders, and the fact discovery remains outstanding. Crouse avers a pattern in  
3 conduct dating prior to the current litigation. For example, an April 2017 Order Revoking Licenses  
4 by Washington State's Office of the Insurance Commissioner (OIC) describes the failure of  
5 plaintiffs and counsel Jan Brucker to provide requested information and documentation or  
6 otherwise respond and comply with OIC inquiries. (Dkt. 116, Ex. 4, pp. 19-21 at ¶¶11-20.) Crouse  
7 requests the imposition of an additional \$20,000.00 in sanctions to account for these other factors.

8         Again, the Court finds both the total number of hours expended and the hourly rates  
9 reasonable. If anything, the rates charged by counsel for Crouse appear, as they suggest, lower  
10 than prevailing rates in this forum. In fact, while expending almost the same number of hours, the  
11 markedly higher rate charged by counsel for MSW results in a fee award almost double that due  
12 Crouse under the lodestar method. Given this discrepancy, and considering other factors under  
13 *Kerr*, the Court finds an upward adjustment of Crouse's fee award warranted. The Court, in  
14 particular, finds Crouse entitled to more than the lodestar figure given the extensive time and labor  
15 required to compel responses, the difficulties posed by bulk productions of documents, and  
16 Crouse's ultimate, but significantly delayed success in obtaining discovery to which it was entitled.

17         However, rather than the additional \$20,000.00 in sanctions requested, the Court finds a  
18 reasonable fee award would be similar to that awarded MSW. The Court, as such, herein finds  
19 Crouse entitled to an additional \$7,000.00 in sanctions, for a total award of \$17,325.50.

20         B.     Request for Dismissal

21         Crouse also requests dismissal of this action. Under Federal Rule of Civil Procedure  
22 37(b)(2)(A)(v), the court may dismiss an action or proceeding in whole or in part for failure to  
23

1 obey a court order to provide or permit discovery.<sup>2</sup> *See also* Fed. R. Civ. P. 37(b)(2)(C) (“Instead  
2 of or in addition to [dismissal or other orders allowed under Rule 37(b)(2)(A)], the court must  
3 order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses,  
4 including attorney’s fees, caused by the failure, unless the failure was substantially justified or  
5 other circumstances make an award of expenses unjust.”) Dismissal under Rule 37(b)(2)(A)  
6 may stem from an order granting a motion to compel, another written or oral order to provide or  
7 permit discovery, or a scheduling order under Rule 16. *Dreith v. Nu Image, Inc.*, 648 F.3d 779,  
8 787 (9th Cir. 2011).

9 Dismissal is a harsh penalty, imposed only in extreme circumstances. *Malone v. United*  
10 *States Postal Service*, 833 F.2d 128, 130 (9th Cir. 1987). However, where “counsel or a party has  
11 acted willfully or in bad faith in failing to comply with rules of discovery or with court orders  
12 enforcing the rules or in flagrant disregard of those rules or orders,” the Court may exercise its  
13 discretion to dismiss. *G-K Properties v. Redevelopment Agency of San Jose*, 577 F.2d 645, 647  
14 (9th Cir. 1978). That discretion will be upheld unless it falls “clearly outside the acceptable range  
15 of sanctions.” *Malone*, 833 F.2d at 130.

16 The Court considers five factors before dismissing for failure to obey a court order to  
17 provide or permit discovery: “(1) the public’s interest in expeditious resolution of litigation; (2)  
18 the court’s need to manage its docket; (3) the risk of prejudice to the other party; (4) the public  
19 policy favoring the disposition of cases on their merits; and (5) the availability of less drastic  
20

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21 <sup>2</sup> Only non-dispositive motions have been referred to the undersigned. (Dkt. 133.) Had the Court  
22 found the requested sanction of dismissal warranted, it would have addressed the request in a Report and  
23 Recommendation. Finding an absence of support, the Court addresses the request as set forth herein.  
Should Crouse take issue with this finding, it may file objections pursuant to Rule 72 or a separate  
dispositive motion.

1 sanctions.” *Dreith*, 648 F.3d at 788 (quoted sources omitted). The Ninth Circuit has held that it  
2 ““may affirm a dismissal where at least four factors support dismissal, or where at least three  
3 factors strongly support dismissal.” *Id.* (quoting *Yourish v. Cal. Amplifier*, 191 F.3d 983, 990  
4 (9th Cir. 1999)).

5 Crouse argues dismissal is warranted due to plaintiff’s repeated, willful noncompliance  
6 with discovery and Court orders, and that both the order from the hearing on March 11, 2019 and  
7 the February 14, 2019 amended case scheduling order may serve as a basis for sanctions. Crouse  
8 points to repeated and still ongoing delays in discovery as impeding the expeditious resolution of  
9 this litigation and the Court’s ability to manage its docket. It maintains prejudice, noting it filed  
10 for sanctions on the eve of the dispositive motion deadline, with discovery still incomplete. Crouse  
11 counters the public policy favoring disposition on the merits with the fact plaintiffs either knew or  
12 should have known how to respond to discovery requests inquiring into the information and  
13 documents on which they base their claims. Finally, Crouse maintains lesser sanctions, including  
14 exclusion of documents produced after the discovery deadline and/or attorney’s fees, would be  
15 ineffective and not remedy the prejudice that has already occurred. It argues any continuation of  
16 the trial date would reward plaintiffs and their dilatory tactics.

17 There is no question the failures to timely and fully comply with discovery requests have  
18 interfered with the expeditious resolution of this matter and the Court’s ability to manage its  
19 docket. Defendants have been prejudiced by delays impacting their ability to prepare their expert  
20 witnesses and dispositive motions, and to otherwise defend against plaintiffs’ claims. The Court  
21 finds the explanations from plaintiffs’ counsel for delayed and deficient responses wanting. It is  
22 further troubled by the fact discovery remains ongoing and by the request for yet more time to  
23 complete discovery and to extend other case deadlines.

1 The Court is not, however, persuaded dismissal is an appropriate sanction at this juncture.  
2 Counsel for plaintiffs offered a reasonable explanation for some delay in the completion of  
3 discovery. Plaintiffs appear to have substantially complied with outstanding discovery requests  
4 and explain a need to supplement following waiver of their objections. While the lengthy and  
5 ongoing delays raise serious questions as to counsel's ability to satisfy her obligations to her  
6 clients, there is little to show the lack of compliance has been willful or in bad faith. Finally, public  
7 policy favors a disposition on the merits and less drastic sanctions, as found above and below, are  
8 available.

9 The Court, in sum, finds insufficient support for the existence of extreme circumstances  
10 warranting dismissal. *Cf. Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 642  
11 (1976) (upholding dismissal where plaintiff had acted in "flagrant bad faith" and "callous  
12 disregard" of the rules by failing to file timely responses to discovery requests and eventually filed  
13 "grossly inadequate" responses); *Allen v. Exxon Corp. (In re Exxon Valdez)*, 102 F.3d 429, 432-  
14 33 (9th Cir. 1996) ("The history of these proceedings reflects a virtually total refusal by appellants  
15 over a period of more than two years to comply with discovery obligations and orders."; upholding  
16 dismissal following repeated warnings that continued noncompliance would result in dismissal,  
17 appellants "had provided either no discovery or so little as to be tantamount to no discovery at all",  
18 and it was undisputed the failure to respond to discovery and comply with "orders to do so was  
19 knowing and deliberate."); *Moneymaker v. CoBen (In re Eisen)*, 31 F.3d 1447, 1451-56 (9th Cir.  
20 1994) (upholding dismissal involving a four-year failure to prosecute, the absence of an adequate  
21 excuse for the delay, and prejudice including the prevention of closing a bankruptcy proceeding  
22 and the loss of a witness); and *G-K Properties*, 577 F.2d at 646-49 (upholding dismissal upon  
23 finding direct disobedience to a court order requiring production of specific documents, repeated

1 by the court on a number of occasions, and the provision of the documents only after the filing of  
2 a motion to dismiss for failure to comply with the court order). The undersigned therefore declines  
3 to recommend dismissal under Rule 37(b)(2)(A).

4 C. Other Sanctions

5 As an additional sanction, MSW requests the Court exclude as inadmissible all documents  
6 produced after the close of discovery on May 15, 2019. MSW notes that Rule 16 permits  
7 modification of the Court's scheduling order "only for good cause and with the judge's consent."  
8 Fed. R. Civ. P. 16(b)(4). Good cause under Rule 16(b) "primarily considers the diligence of the  
9 party seeking the amendment." *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th  
10 Cir. 1992). If the party seeking modification "was not diligent, the inquiry should end." *Id.* MSW  
11 asserts the existence of ample evidence plaintiffs were not diligent in complying with the Court's  
12 discovery deadlines and plaintiffs' failure to demonstrate good cause.

13 Pursuant to Rule 16(f)(1)(C), the Court "may issue any just orders, including those  
14 authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party or its attorney . . . fails to obey a scheduling or  
15 other pretrial order." *See also* Fed. R. Civ. P. 16(f)(2) (providing for payment of expenses,  
16 including attorney's fees, instead of or in addition to any other sanction for noncompliance with  
17 Rule 16, unless the noncompliance was substantially justified or other circumstances make an  
18 award unjust). In addition to an order of dismissal under subpart (v), the Rule 37 orders  
19 incorporated by reference into Rule 16(f) include the following:

20 (ii) prohibiting the disobedient party from supporting or opposing  
21 designated claims or defenses, or from introducing designated  
matters in evidence;

22 (iii) striking pleadings in whole or in part;

23 (iv) staying further proceedings until the order is obeyed;

1  
2 . . .

3 (vi) rendering a default judgment against the disobedient party; or

4 (vii) treating as contempt of court the failure to obey any order  
except an order to submit to a physical or mental examination.

5 Rule 37(b)(2)(A).<sup>3</sup>

6 The Ninth Circuit has clarified why Rule 16 deadlines must be taken seriously:

7 [I]n these days of heavy caseloads, trial courts in both the federal  
8 and state systems routinely set schedules and establish deadlines to  
9 foster the efficient treatment and resolution of cases. Those efforts  
10 will be successful only if the deadlines are taken seriously by the  
11 parties, and the best way to encourage that is to enforce the  
deadlines. Parties must understand that they will pay a price for  
failure to comply strictly with scheduling and other orders, and that  
failure to do so may properly support severe sanctions and  
exclusions of evidence.

12 *Wong v. Regents of the Univ. of Cal.*, 410 F.3d 1052, 1060 (9th Cir. 2005). While “[d]eadlines  
13 must not be enforced mindlessly,” and good reason may exist for a lack of compliance, *id.*, district  
14 courts have wide latitude to control discovery and their rulings enforcing compliance with  
15 deadlines will be overturned only in the absence of a clear abuse of discretion. *Cornwell v. Electra*

16  
17 <sup>3</sup> Other provisions of Rule 37 providing for sanctions do not apply. Rule 37(c) allows for exclusion  
18 of information or witnesses for failure to provide initial disclosures under Rule 26(a) or supplemental  
19 disclosures or responses under Rule 26(e), unless the failure was substantially justified or is harmless. Fed.  
20 R. Civ. P. 37(c)(1). Rule 37(d) provides for sanctions where a party “fails to serve its answers, objections,  
21 or written response” to interrogatories or requests for inspection, Fed. R. Civ. P. 37(d), but only applies  
22 where a party does not serve *any* answers, objections, or written response, *Fjelstad v. American Honda*  
23 *Motor Co.*, 762 F.2d 1334, 1339-1340 (9th Cir. 1985). In addition, if a Court finds Rule 37 does not provide  
an adequate remedy, additional means may be employed to sanction a party based on the Court’s inherent  
power to sanction. *Haeger v. Goodyear Tire & Rubber Co.*, 793 F.3d 1122, 1132 (9th Cir. 2015) (Rule 37  
“is not the exclusive means for addressing the adequacy of a discovery response.”) However, “[b]efore  
awarding sanctions pursuant to its inherent power, ‘the court must make an express finding that the  
sanctioned party’s behavior constituted or was tantamount to bad faith.’” *Id.* (quoting *Leon v. IDX Sys.*  
*Corp.*, 464 F.3d 951, 961 (9th Cir. 2006) (some internal quotation marks omitted). MSW does not here  
offer an argument supporting a finding of bad faith.

1 *Central Credit Union*, 439 F.3d 1018, 1027 (9th Cir. 2006) (declining to limit “district court’s  
2 ability to control its docket by enforcing a discovery termination date, even in the face of requested  
3 supplemental discovery that might have revealed highly probative evidence, when the plaintiff’s  
4 prior discovery efforts were not diligent.”) (cited sources omitted).

5 In this case, plaintiffs continued to produce documents after the May 15, 2019 discovery  
6 deadline established by the Court’s amended scheduling order. Neither the health and family  
7 issues of plaintiffs’ primary counsel, nor the need to respond to additional interrogatories  
8 sufficiently account for the failure to comply with this deadline. The Court twice advised counsel  
9 at hearing of the need to comply with Court rules and deadlines and the possibility of harsh  
10 sanctions, including up to dismissal, if she failed to do so. Despite these admonitions, and despite  
11 associating counsel and acquiring other assistance for review and redaction, it appears responses  
12 to discovery requests and/or updates to the discovery index remain incomplete. Indeed, plaintiffs  
13 continue to seek extension of case deadlines in responding to the motions for sanctions.

14 Plaintiffs have not been diligent and do not demonstrate good cause for their failure to  
15 comply with their discovery obligations, case deadlines, and other Court orders. The Court finds  
16 reasonable MSW’s request for an order excluding as inadmissible any documents produced after  
17 the May 15, 2019 discovery deadline.<sup>4</sup>

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19 <sup>4</sup> It should be noted that neither party discusses the specific documents subject to the request for an  
20 order of inadmissibility or whether the exclusion of those documents could have a dispositive effect on this  
21 case. If effectively case-dispositive, further inquiry would be necessary, including consideration of the five  
22 factors outlined above in relation to the sanction of dismissal. *See generally Dreith*, 648 F.3d at 788; *Yeti*  
23 *by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1107 (9th Cir. 2001); *Wendt v. Host International,*  
*Inc.*, 125 F.3d 806, 814 (9th Cir. 1997); *Galentine v. Holland Am. Line - Westours, Inc.*, 333 F. Supp. 2d  
991, 993-94 (W.D. Wash. 2004). Such an impact appears unlikely given plaintiffs’ contention “the  
documents now being produced[] likely have little or no relevance to any parties’ claims.” (Dkt. 180 at 5.)  
However, should this issue require further consideration, plaintiffs’ counsel may raise it in objections to  
this Order or in a separate motion.

1 CONCLUSION

2 MSW's Petition for Attorney's Fees and Discovery Sanctions (Dkt. 165) is GRANTED  
3 and Crouse's Motion for Sanctions (Dkt. 168) is GRANTED in part and DENIED in part. MSW  
4 is awarded the \$17,356.50 in attorney's fees requested and Crouse is awarded a total of \$17,325.50  
5 in fees. Any documents produced by plaintiffs after the close of discovery on May 15, 2019 shall  
6 be inadmissible.

7 DATED this 29th day of July, 2019.

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9 Mary Alice Theiler  
10 United States Magistrate Judge  
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